IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1587

KENNETH L. SNOW,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

I.

REPORT OF OPINION RENDERED BELOW

The opinion below was reported as United States v. Snow, _____ F. 2d _____ (9th Cir., decided January 30, 1976), No. 75-1056.

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 30, 1976, affirming petitioner's conviction dated December 16, 1974. A petition for rehearing was denied on March 31, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

The subject Ninth Circuit opinion is in conflict with United States v. Long, 257 F. 2d 340 (3rd Cir. 1958).

III.

QUESTION PRESENTED

Whether failure to file federal income tax returns for 1961 through 1967 (without substantial proof of a corresponding requirement to file for those years) are acts of similar conduct so as to be relevant on the issue of filing false returns for 1968, 1969 and 1970.

IV.

STATUTE INVOLVED

Internal Revenue Code of 1954, provided as of the dates involved in the case:

"Sec. 7206(1954) Any person who---
(1) DECLARATION UNDER PENALTIES OF PERJURY.-- Wilfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or . . . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000.00 or imprisoned not more than 3 years, or both, together with the costs of prosecution."

"Sec. 7203(1954 Code). Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015), keep any records, or supply any information, who wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than

1 year, or both, together with the costs of prosecution."

V.

STATEMENT

On December 16, 1974, petitioner was found guilty on counts one, two and three of filing false federal income tax returns for the years 1968, 1969 and 1970, respectively, Int. Rev. Code of 1954, Sec. 7206(1), and on a fourth count of failing to file a return for 1971, Int. Rev. Code of 1954, Sec. 7203.

On count one petitioner was committed to imprisonment for a period of one year and one day. On counts two and three, imposition of sentence was suspended and defendant was placed on probation for a period of three years. Count four was dismissed.

During the trial, the Government called as a witness, Mr. Leslie L. Clark, a representative of the District Director for the Los Angeles District, for the

San Diego Office (Internal Revenue Service) (R.T. 152:23-24). Mr. Clark identified Government's Exhibits 16 and 17, Certificates of Assessment and Payments of Federal Income Tax (R.T. 153:20-22). Exhibit 16 related to the Los Angeles District, (R.T. 154:16) and Exhibit 17 related to the San Francisco District (R.T. 154:10). Each of those Exhibits indicated that there were no records of income tax returns filed for the years 1961, 1962, 1963, 1964, 1965, 1966, and 1967 (R.T. 154:6-16).

The Government offered no evidence of any nature whatsoever as to defendant's income for said years or other evidence that would be relevant to his tax liability or requirement to file income tax returns for said years.

The jury was subsequently instructed that they might consider evidence of

alleged earlier acts of a like nature on the element of defendant's intent to commit any of the offenses with which he was charged.

VI.

ARGUMENT

EVIDENCE OF DEFENDANT'S PRIOR TAX PAYING HISTORY IS LIMITED TO ACTS OF SIMILAR CONDUCT.

In Morrison v. United States, 270 F. 2d 1, 4-6 (4th Cir.), cert. denied, 361 U.S. 894 (1959), the general rule is stated, at page 4, as follows:

> ". . . under the principle, long recognized and settled, that in the proof of a criminal intent it is permissible, in order to negative an assumption of accident or inadvertence, to show that the defendant has committed similar acts previously or that the act under investigation is one of a repeated pattern of conduct." (emphasis added)

The Court, in Morrison, then cites Wignore on Evidence (3d Ed., Sec. 302), as follows:

> "The argument here is purely from the point of view of the doctrine of chances--the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all."

In Wigmore on Evidence (3rd Ed., Vol. 2, p. 200, Sec. 302), it is further stated:

> "It is at least necessary that prior acts should be similar (emphasis added) since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instances." Cited in Enriquez v. U.S., 314 F. 2d, 703, 717 (9th Cir. 1963).

In Enriquez, the Court held that the admission of testimony of previous possession or use of marijuana by one of the defendants to show intent to sell heroin was error. At page 717, the Court stated:

> "Whartons, 12th Edition (1955), refers to the necessity that the prior act, offered to show intent, be 'inseparably interwoven'."

Petitioner contends that evidence of defendant's failure to file Federal Income Tax Returns for the calendar years 1962 through 1967, inclusive, did not constitute similar acts to the offenses

with which defendant was charged. Nor did the failure to file said income tax returns constitute a same pattern of procedure or a repeated pattern of conduct and, likewise, said passive acts of failing to file tax returns are not inseparably interwoven with the offenses which defendant was charged.

In United States v. Long, 257 F. 2d, 340 (3rd Cir. 1958), defendant was convicted of wilfull income tax evasion for the years 1949, 1950, 1951 and 1953, and on appeal the Third Circuit held that it was improper to admit evidence that the defendant did not file an income tax return for the year 1948 for the purpose of showing wilfullness in his alleged understatement of income for the years immediately thereafter. At page 341, the Court said:

> "It is difficult to see how evidence concerning passive failure

> to perform a required act in 1948 can indicate wilfullness in affirmative misdoings during the following year. That the accused was willing to ignore his filing obligation in 1948 has no significant tendency to show intentional misrepresentation in a return actually filed in 1949." (emphasis added)

The court below cited United States v. Bishop, 412 U.S. 346 (1973) for the proposition that wilfullness has the same meaning under failure to file as under false filing and United States v. Hawk, 497 F. 2d 365 (9th Cir.), cert. denied, 419 U.S. 838 (1974), which held that false filing is relevant on the element of wilfulness. These citations miss the point raised on appeal. The appeal argued that mere failure to file without substantial proof of a corresponding requirement to file is not an act of similar conduct to offenses with which the defendant was charged.

The Bishop case involved a question

of a felony and a lesser included offense for the same year and, therefore, is not relevant to the appeal issue.

The Hawk case involved failure to file and subsequent false returns for the same years and likewise, is not relevant to the appeal issue.

The court below also cited United States v. Magnus, 365 F. 2d 1007 (2d Cir. 1966) cert. denied, 386 U.S. 909 (1967) and Emmich v. United States, 298 F. 5 (6th Cir.), cert. denied, 266 U.S. 608 (1924), as authority for the argument that evidence of failure to file supports a basis for relevance of false filing for subsequent years. Careful analysis of these cases supports petitioner's argument that naked evidence of failure to file income tax returns in earlier years without substantial evidence to prove a requirement to file is not an act of similar conduct and

is therefore not admissible as proof that petitioner intended to file false income tax returns in later years.

The Emmich case held that the failure of defendant to file a tax return for 1920, and evidence of his occupation, income, and expenditures during that year were admissible on the issue of filing a false return for 1921 (underlining added for emphasis). Based on investigations by agents of the Commissioner of Internal Revenue, evidence was developed as to the existence of several large banks accounts in 1920. Investigation also revealed that during 1920 the defendant derived income from gambling, such as poker, craps, and betting on the races. In 1922, defendant filed a delinquent return for 1920 based on an income of $5,500.00, which conclusively proved that a return for 1920 was required.

The Magnus case involved failure to

pay federal income taxes of approximately $26,000.00 for 1955, $33,000.00 for 1956, and $27,000.00 for 1957. Evidence was admitted regarding failure to pay taxes for eleven years prior to 1955. There was proof that defendant underpaid his taxes by at least $20,000.00 for every year between 1948 and 1954. Such consistent substantial underpayment supported a finding of similar acts to the identical offenses of substantial underpayment with which defendant was charged for subsequent years.

Compared to the evidentiary standards applied in the Emmich and Magnus cases, the standards applied in petitioner's case fall woefully short. The prejudicial damage of mere failure to file far outweighed the probative value. Petitioner's substantive rights were so affected that the result is plain error.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

Ray Lapica and
Ray O. Womack

Counsel for Petitioner

April 28, 1976.

APPENDIX "A".

COPY OF OPINION AND

JUDGMENT BELOW.

(Endorsed) Filed, 1976 January 30, Emil E. Melfi, Jr. Clerk.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Kenneth L. Snow, Defendant-Appellant, No. 75-1056,

Appeal from the United States District Court for the Southern District of California.

Before: DUNIWAY and ELY, Circuit Judges, and SOLOMON,* District Judge.

PER CURIAM:

Snow was convicted on three counts

*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

of filing false federal income tax returns for the years 1968, 1969, and 1970. Int. Rev. Code of 1954, 7206(1). Snow was also convicted on a fourth count of failing to file a return for 1971, Int. Rev. Code of 1954, 7203, but the trial court later set aside that conviction. Snow appeals the three false-filing convictions. He asserts that the trial court erroneously admitted evidence of his failure to file state and federal income tax returns. We affirm.

In February 1972, Snow filed a federal income tax return for 1968. This was the first time in at least 10 years that he filed a federal income tax return. In April 1972, Snow filed returns for 1969 and 1970. He did not file a return for 1971.

The returns that he filed were not

only late, but also inaccurate. He materially understated his income and overstated his exemptions.

At the trial Snow blamed his accountant for the errors. Snow testified that he and Mrs. Snow hired Mrs. Peterson, an accountant, because the Snows were organizing a construction company. Snow said that he knew nothing about income taxes and that his wife managed the family finances. According to Snow, he and his wife signed blank federal returns for 1968, 1969 and 1970. They gave these returns to Mrs. Peterson to complete. They said that they saw no more of these returns.

Mrs. Peterson testified differently. She agreed that Mrs. Snow approached her to prepare a tax return for a construction business partnership that Snow was winding up. She said that

Mrs. Snow told her that California state tax authorities had sent Snow an assessment of overdue taxes for 1968. Mrs. Peterson said that she advised the Snows to pay the assessment and to file federal returns because "... it would only be a matter of time 'til federal would know that they hadn't filed returns . . . .".

The Snows engaged Mrs. Peterson to prepare their federal income tax returns. Mrs. Peterson either gave or sent the 1968 return to the Snows. She testified that in April 1972 she delivered the completed 1969 and 1970 returns to the Snows at their home and that she explained and watched them sign the returns.

In this appeal Snow asserts that the court erred in admitting evidence of his failure to file federal

income tax returns for the six years preceding 1968. Snow also asserts that the court erred in admitting evidence that in 1970 he received a notice of tax liability for 1968 from the State of California.

The evidence of Snow's failure to file returns for six years was admissible on count four, the failure-to-file count. The court instructed the jurors that they might consider evidence of "an alleged earlier act of a like nature" only on the element of intent, and only if they first found "that the accused did the particular act charged in . . . the indictment. . ."

Snow argues that his six-year failure to file was not conduct similar to, or probative of, his filing false returns. He says that failure to file is passive and filing false returns is

active.

Snow's primary defense was that he was passive. He testified that he did not know anything about taxes and relied on either his wife or his accountant to file proper returns. Although evidence of his failure to file was consistent with his defense, he now complains that this evidence was prejudicial.

Even if Snow can properly raise this objection now, it must be rejected. Both the failure to file and false filing require proof of willfulness. 1/ In United States v. Bishop, 412 U.S. 346 (1973), the Supreme Court gave

1/ "Any person . . . who willfully fails to pay such . . . tax . . . shall . . . be guilty of a misdemeanor . . ." Int. Rev. Code of 1954, 7203.

"Any person who -- (1). . . (w)illfully makes and subscribes any return . . . which he does not believe to be true . . . shall be guilty of a felony . . ." Id. 7206.

willfulness the same meaning under failure to file as under false filing. In United States v. Hawk, 497 F.2d 365 (9th Cir.), cert. denied, 419 U.S. 838 (1974), we held that in a failure to file case, evidence of false filing is relevant on the element of willfulness. We have not had occasion since Bishop to consider whether the reverse is also true.

In false filing cases, evidence of failure to file is admissible on the element of willfulness. United States v. Magnus, 365 F.2d 1007 (2d Cir. 1966), cert. denied, 386 U.S. 909 (1967), Emmich v. United States, 298 F. 5 (6th Cir.), cert. denied, 266 U. S. 608 (1924).[2/]

2/ Only United States v. Long, 257 F.2d 340 (3rd Cir. 1958), is to the contrary. Long was rejected in United States v. O'Connor, 433 F.2d 752, 755 (1st Cir. 1970), cert. denied, 401 U.S. 911 (1971).

Evidence that in 1970 Snow received an assessment of his 1968 tax liability from the State of California, which he paid in December 1971, was also properly admitted. It was relevant on the issue of willfulness. United States v. Magnus, supra. It was also relevant on the issue of credibility. It tended to support Mrs. Peterson's testimony that she was engaged by the Snows to prepare their federal income tax returns after she told them that the Internal Revenue Service would soon learn of the state action. The Snows denied any correlation.

We believe the testimony on Snow's failure to file state and federal income tax returns was both relevant and admissible.

AFFIRMED.

Supreme Court, U. S.
FILED
JUL 1 1976
CLERK

No. 75-1587

In the Supreme Court of the United States

OCTOBER TERM, 1975

KENNETH L. SNOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1587

KENNETH L. SNOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in admitting evidence of his failure to file federal income tax returns for the years 1961 through 1967 in his prosecution for filing false returns for the years 1968 through 1970.

After a jury trial, petitioner was convicted in the United States District Court for the Southern District of California on three counts of having willfully filed false income tax returns for the years 1968 through 1970, in violation of 26 U.S.C. 7206(1).[1] He was sentenced to a term of one year and one day on the first count. The court imposed concurrent terms of three years' probation on the remaining two counts, to commence after the expiration of the prison term

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[1]Petitioner was also convicted of one count of having willfully failed to file an income tax return for 1971, in violation of 26 U.S.C. 7203, but the district court later set aside the conviction on this count (Pet. App. A, p. 2).

on the first count. The court of appeals affirmed (Pet. App. A, pp. 1-8).

At trial, it was stipulated that petitioner's income tax returns for 1968 through 1970 were false because they omitted "subcontracting income" which petitioner had received from the Jack Files Construction Company (R.T. 18-19, 180-183).[2] It was also shown that petitioner's tax returns were false because he overstated the number of exemptions to which he was entitled (R.T. 18-19, 21-32, 35, 39; Govt. Ex. 7).

As part of its proof on the issue of willfulness, the government established that petitioner had not filed tax returns for the years 1961 through 1967 (R.T. 152-154; Govt. Exs. 16, 17). The jury was instructed that this evidence was offered solely on the issue of petitioner's intent (Pet. App. A, p. 5; R.S.T. 4, 9, 15-16, 26).[3] In his testimony, petitioner admitted that although he had earned over $600 in

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[2]"R.T." refers to the reporter's transcript of proceedings at the trial. "R.S.T." refers to the reporter's supplemental transcript. "Govt. Ex." references are to exhibits introduced by the government at trial.

[3]The trial court charged the jury as follows (R.S.T. 15-16, 26):

> Evidence that an act was done at one time or on one occasion is not any evidence or proof whatever that a similar act was done at another time or on another occasion; that is to say, evidence that a defendant may have committed an earlier act of a like nature may not be considered by the jury in determining whether the accused committed any act charged in the indictment.
>
> Nor may evidence of an alleged earlier act of a like nature be considered for any other purpose whatever, unless the jury first finds that the other evidence in the case standing alone establishes beyond a reasonable doubt that the accused did the particular act charged in the particular count of the indictment then under deliberation. If the jury should find beyond a reasonable doubt from other evidence in the case that the accused did the act charged in the particular count under deliberation, then the jury may consider evidence as to an alleged earlier act of a like nature in determining the state of mind or intent with which the accused did the act charged in the particular count. And where proof of an alleged earlier act of a like nature is established by evidence which is clear and conclusive, the jury may, but not obligated to, draw the inference and find that, in doing the act charged in the particular count under deliberation, the accused acted willfully and with specific intent, and not because of mistake or accident or other innocent reason.
>
> * * * * *
>
> You are instructed that, although the defendant is in this indictment charged only with criminal income tax violations for the calendar years 1968 through 1971, the court permitted the Government to introduce evidence that no return was filed for the years 1962 through 1967. Such evidence is to be considered by you only insofar as you may find that it bears or relates to the intent of the defendant for the years involved in the indictment. In other words, such evidence can only be considered by you for the limited purpose of throwing light upon the state of mind and intent of the defendant during the years charged in the indictment.

each of the years 1962 through 1967, he had not filed federal income tax returns for those years (R.T. 402-403, 419).

1. Although petitioner concedes (Pet. 9-10) that prior acts similar to the offense charged are admissible on the issue of intent, he argues (Pet. 10-12) that a failure to file a tax return is not similar to the act of filing a false tax return. But the failure to file a required tax return and the filing of a false tax return both evidence a disregard of the same duty imposed by the tax laws, *viz.*, the duty to report honestly and completely as to income, deductions, exemptions, and the like. Thus, as the decision below correctly observed (Pet. App. A, pp. 7-8), the courts of appeals have held that evidence of the defendant's attitude toward honest reporting of income and deductions, either prior or subsequent to the acts charged, may be admitted with proper limiting instructions to the jury. See, *e.g.*, *Emmich* v. *United States*, 298 Fed. 5 (C.A. 6), certiorari denied, 266 U.S. 608 (evidence of prior failure to file return admissible in trial for filing a false return); *Harris* v. *United*

States, 243 F.2d 74 (C.A. 5), certiorari denied, 355 U.S. 817 (same); *United States* v. *Taylor*, 305 F.2d 183, 185-186 (C.A. 4), certiorari denied, 371 U.S. 894 (evidence of prior failure to file and underpayment of state income taxes admissible in trial for filing false returns); *United States* v. *Magnus*, 365 F.2d 1007, 1011 (C.A. 2), certiorari denied, 386 U.S. 909 (evidence of prior failure to file admissible in trial for tax evasion); *United States* v. *O'Connor*, 433 F.2d 752, 754-755 (C.A. 1), certiorari denied, 401 U.S. 911 (evidence of defendant's delinquent payments and statement in his political flier that he had paid tax admissible to prove willfulness in trial for failure to file). Accord: *Amos* v. *United States*, 496 F.2d 1269, 1273-1274 (C.A. 8), certiorari denied, 419 U.S. 896.

2. Petitioner argues (Pet. 2, 11) that the decision below conflicts with *United States* v. *Long*, 257 F.2d 340 (C.A. 3).[4] There, the court held that evidence that the defendant had failed to file a return in 1948 was inadmissible on the issue of his willfulness with respect to a tax evasion charge for the years 1949 through 1953. In so holding, the court emphasized that the defendant's failure to file was only for one year and was therefore different from the cases "which hold that repetition of the same course, whether failure to file or substantial understatement, over several years may justify an inference that this was intentional rather than inadvertent" (257 F.2d at 342). Thus the court in *Long* itself distinguished its decision from cases, such as this one, where there was evidence of repeated failures to file over an extended (in this instance seven-year) period.

The decision in *Long* stood in part on the Third Circuit's view that under *Spies* v. *United States*, 317 U.S. 492, "it is difficult to see how evidence concerning passive failure to perform a required act in 1948 can indicate willfulness in affirmative misdoing during the following year" (257 F.2d at 341). But nothing in *Spies* precludes the

introduction of such evidence as long as it is accompanied with proper limiting instructions. *Spies* only rejected the "contention that a willful failure to file a return, together with a willful failure to pay the tax, may, without more, constitute an attempt to defeat or evade a tax * * *" (317 U.S. at 494-495). Thus, *Spies* bars a felony conviction for tax evasion when the proof will only support the misdemeanors of failure to file a return and failure to pay the tax.

Here, however, the proof of petitioner's prior failure to file was admitted only for the purpose of showing willfulness and not as proof of the falsity of petitioner's return. Such falsity was separately proved by independent evidence. The court of appeals therefore properly refused to subscribe to this ground of the *Long* decision, noting (Pet. App. A, p. 7 n. 2) that it has been explicitly rejected by the First Circuit in *O'Connor*. Indeed, apart from the weight of subsequent appellate decisions to the contrary, recent decisions of the Third Circuit suggest that *Long* would no longer be followed by that court. See, *e.g.*, *United States* v. *Todaro*, 448 F.2d 64, 66-67 (C.A. 3), certiorari denied, 404 U.S. 1040; *United States* v. *Carter*, 401 F.2d 748, 749-750 (C.A. 3), certiorari denied, 393 U.S. 1103. See also *United States* v. *Stirone*, 262 F.2d 571, 576 (C.A. 3), reversed on other grounds, 361 U.S. 212.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.

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[4]Petitioner also asserts (Pet. 12-15) that there was no proof that he was required to file the returns which he did not file. But petitioner conceded at trial that he did not file income tax returns for the years 1962 through 1967 although he had earned over $600 in each of those years. See 26 U.S.C. 6012, as effective prior to December 31, 1971.